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In the Supreme Court of the United States

October Term, 1959

TAL JOE FERRIER AND SOUTH WIND, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 93

TAL JOE PEARSON AND SQUIRE WILES, PETITIONERS

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 21–33) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959. On April 25, 1959, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including June 5, 1959, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is violative of due process for the judge in a criminal case to refer to presentence investigative reports, not shown to the defendants, as an aid to the imposition of a proper sentence.

2. Whether the several counts charging petitioner Pearson with illicit possession of sugar charged but one offense, notwithstanding that the dates of the alleged offenses or the persons charged as alleged co-possessors, or both, were different in the different counts.

3. Whether prejudicial error resulted from the omission, in certain counts charging unlawful possession of sugar, of a citation to the statute allegedly violated thereby.

4. Whether, in a prosecution for possessing sugar intended for use in the illegal manufacture of whiskey, the Government is required to prove that sugar is a necessary ingredient in manufacturing whiskey.

STATEMENT

Count 2 of a seven-count indictment (R. 2a, pp. 1–11),[1] filed on or about October 21, 1957, in the

[1] "R." refers to the printed records in the Court of Appeals (consisting of the appendices, partially repaginated, to four briefs in two consolidated cases), to which have been appended the proceedings in that court. The Appellant's Appendix in Court of Appeals case No. 7706 has not been repaginated. It will be referred to by the designation "1a" (the number written in red on the cover), followed by the page number or numbers referred to. Similarly, the Appellee's Appendix in case No. 7706 has not been repaginated. It will be referred to by the designation "2a" (the number written in red on the cover), followed by the page number or numbers referred to.

In addition, references will be made to the reporter's tran-

United States District Court for the Middle District of North Carolina, charged petitioner Pearson and 11 other defendants [2] with having conspired, contrary to 18 U.S.C. 371, to violate the laws of the United States by (1) possessing sugar intended to be used in the illegal production of distilled spirits, in violation of 26 U.S.C. (Supp. V) 5686, and (2) falsely reporting to the Treasury Department the names of the purchasers of the sugar, in violation of 18 U.S.C. 1001.[3] Counts 4, 5, and 6 (R. 2a, pp. 9–10) each charged petitioner Pearson, together with certain of his co-defendants (their identity varying from count to count), with having unlawfully possessed, on a designated date or dates, a specified or unspecified

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scripts in the two cases, copies of which are being lodged with the Clerk of this Court. The two cases bore the docket numbers 435–W–57 and 450–W–57 in the trial court. We shall refer to the transcripts by the designation "Tr.", preceded in each instance by the docket number ("No. 435" or "No. 450").

[2] None of these other defendants is presently before the Court, their cases having been disposed of by pleas of guilty, dismissals on motion of the government, or otherwise.

[3] 26 U.S.C. (Supp. V) 5686(b) makes it unlawful "to have or possess any liquor or property intended for use in violating the provisions of this chapter, or regulations prescribed thereunder * * *." 18 U.S.C. 1001 makes it criminal for any who, "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry * * *."

Treasury Department regulations require the reporting, on Treasury Form 169, of the names of the purchasers of sugar sales in excess of 60 pounds.

quantity of sugar "intended for use in violating the provisions of the internal revenue laws relating to distilled spirits" (in violation of 26 U.S.C. (Supp. V) 5686).[1] Count 3 charged Pearson and various co-defendants with such illegal possession on "divers dates" during a stated period.

Counts 1 and 7 are no longer involved, the former having been dismissed on motion of the government and a verdict of not guilty having been returned on the latter (No. 435, Tr. 497–498, 553).

Count 1 of a separate indictment, in three counts (R. 9–10), filed in the same court on October 21, 1957, charged both petitioners, Pearson and Wiles, together with two other named defendants, with having, on or about April 1, 1957, unlawfully possessed a designated quantity of sugar "intended for use in violating the provisions of the Internal Revenue Laws relating to distilled spirits," in violation of 26 U.S.C. (Supp. V) 5686. Count 2 charged the same four defendants with having committed a like offense on a different date, May 13, 1957. Count 3 is no longer involved, a verdict of acquittal having been returned (No. 450, Tr. 114).

A separate jury trial was had on each indictment. Petitioner Pearson was found guilty on counts 2, 3, 4, 5, and 6 of the seven-count indictment (No. 435, Tr. 552–553), and both petitioners were found guilty on counts 1 and 2 of the three-count indictment (No. 450, Tr. 114).

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[1] The indictment did not cite the statute alleged to have been violated in those counts. See *infra*, pp. 10–11.

Petitioner Pearson was sentenced to 18 months' imprisonment and a fine of $7,000 on the conspiracy count (count 2) of the seven-count indictment (case No. 435) and to one year's imprisonment and a fine of $500 on each of counts 3, 4, 5, and 6 of that indictment, the prison sentences to run consecutively (R. 1a, pp. 49–50);[5] and to one year's imprisonment and a fine of $500 on each of counts 1 and 2 of the three-count indictment (case No. 450), the prison sentences to run consecutively to each other and to those under the other indictment. He received, therefore, an aggregate prison sentence of 7½ years and aggregate fines of $10,000 (R. 1a, pp. 49–50). Execution of all of the prison sentences except the 18 months' sentence on count 2 of the indictment in case No. 435 was ordered suspended on condition that Pearson pay all fines imposed in both cases (R. 1a, p. 50). Petitioner Wiles was sentenced generally to 18 months' imprisonment and a fine of $2,000 (R. 8).

On appeal to the Court of Appeals for the Fourth Circuit, where the two cases were consolidated, the judgments of conviction were affirmed (R. 23–24; Pet. 21–33).

The evidence adduced by the government may be summarized as follows:

Case No. 435. In September 1956, petitioner Pearson, the operator of a large supermarket, asked one Coley Johnson, an ex-convict (with convictions under the internal revenue laws relating to the manufacture

[5] The record indicates that the judge said the sentences were to run "successively and not consecutively" (R. 1a, p. 50). It is clear from the context that he meant "successively and not concurrently."

and possession of whiskey), to go back into the "sugar business" with him (R. 1-2; R. 1a, pp. 12–13; No. 435, Tr. 89–90, 165–169). Johnson had been in the "sugar business" with Pearson a few years before and understood the term to mean selling sugar to operators of illegal stills (R. 1a, pp. 13–16; No. 435, Tr. 90–95). Pearson's suggestion was that Johnson promote the sales and permit Pearson to report them as sales to Johnson on the bills of lading, bills of sale, and sales reports to the Internal Revenue Service, and thus to avoid "trouble with the Internal Revenue."[6] In return, Johnson was to receive a salary and a commission on each bag of sugar sold (No. 435, Tr. 189–190). Johnson reported Pearson's proposal to the Federal Alcohol and Tobacco Tax Unit and thereafter carried out his dealings with Pearson as an undercover agent (No. 435, Tr. 245–247).

From September 1956 through July 1957, Johnson, acting as Pearson's agent, arranged for a number of sales of sugar to Clyde Curry, a named co-defendant and the operator of a number of unregistered stills in the area. Employees of Curry would pick up the sugar at a feed house behind Pearson's supermarket and haul it to the distilleries (R. 1a, p. 30; No. 435, Tr. 253–254, 255–256, 261–262, 264–268, 269–272, 277-

[6] In November 1956, Pearson was served with a "demand letter" by internal revenue authorities requiring that he report on Treasury Form 169 all sales of sugar from his supermarket of more than 60 pounds each, as well as sales of certain other products used in distilling illegal whiskey. Furthermore, Pearson, aware that a demand letter had been served upon his predecessor in the supermarket, believed in September 1956 that he was required to file such reports (No. 435, Tr. 40, 43, 47–49, 57–58, 61–62, 67–68, 392–395, 396–398).

278, 335–336, 339–343, 344, 345, 346, 347, 352–353). Payment would be made to Pearson either directly or through Johnson. Upon receiving payment, Pearson would make out a sales slip to Johnson as purchaser and sign Johnson's name. Pearson's secretary would fill out Treasury Form 169, showing Johnson as the purchaser, which would then be signed either by Pearson personally or by his wife on his behalf (R. 1a, pp. 21–27; No. 435, Tr. 64, 146–160, 163, 240–243, 296–302). On most occasions Pearson was at the supermarket when the sugar was loaded for delivery (No. 435, Tr. 93–103, 107–112, 115–120, 121–127, 128–131, 132–134, 136–138, 139–140, 142–145). Pearson and Johnson followed the same procedure in making sales to other operators of illegal stills, not named in the indictment, including petitioner Wiles (No. 435, Tr. 177–180, 328–332, 334–335, 337–338, 352).

Case No. 450. Much of the same evidence which was presented in case No. 435 was also presented in case No. 450. Coley Johnson testified concerning petitioner Pearson's proposal in September 1956 that Johnson go back into the "sugar business" with him and to the fact that Pearson intended to use Johnson's name on Treasury Form 169 as the purchaser of the sugar (R. 1–2; No. 450, Tr. 9–11). Johnson agreed and began to solicit customers for Pearson, at the same time acting as an undercover agent for the Internal Revenue Service. At Pearson's direction, Johnson went to the home of petitioner Wiles on a number of occasions and talked with Wiles about selling him sugar (No. 450, Tr. 13, 14, 16, 30, 31). Wiles was reputed to be in the liquor business and

over a period of years had been convicted six or seven times for violations relating to illegal whiskey (No. 450, Tr. 89–91, 93, 95). In April 1957, Johnson sold and delivered 2,400 pounds of sugar to the home of Willard Wiles, son of petitioner Wiles (No. 450, Tr. 13, 14, 16). On May 13, 1957, petitioner Wiles approached Johnson at petitioner Pearson's supermarket and told him that he needed some sugar. Later that evening Pearson instructed Johnson, one Woolard (a government undercover agent working with Johnson), and four of Pearson's employees to load thirty 100-pound bags of sugar into a truck that Johnson was using in his operations. Johnson and Woolard drove the truck to the home of petitioner Wiles, and the latter directed them to put the sugar into another truck parked near his barn (R. 5; No. 450, Tr. 20, 21, 40–41). On May 25, 1957, Johnson and Woolard went to the home of petitioner Wiles and purchased two cases of non-tax-paid whiskey (No. 450, Tr. 23–24, 58–59).

ARGUMENT

1. There is no merit to petitioners' contention (Pet. 11–14) that they were denied procedural due process because, prior to imposing sentence, the trial judge examined presentence investigative reports which were not made available to them. Rule 32(c) of the Federal Rules of Criminal Procedure expressly provides for the use of such reports by judges before imposing sentence. In *Williams* v. *New York*, 337 U.S. 241, this Court held that a defendant in a state

capital case was not denied due process by a trial judge's use of such reports in sentencing. The federal practice of using such reports is well established, and it was expressly sustained in *Price* v. *United States*, 200 F. 2d 652, 654 (C.A. 5), and *Friedman* v. *United States*, 200 F. 2d 690, 697 (C.A. 8), certiorari denied, 345 U.S. 926.

2. Petitioner Pearson contends (Pet. 14–15) that the counts alleging illegal possession of sugar on particular dates charged the same offense as the count alleging illegal possession on "divers dates" within a specified period, and that his conviction on the latter count bars his conviction on the former counts. We submit, however, that the "divers dates" and specific date counts charged separate offenses.

The third count of the indictment in case No. 435 charged petitioner Pearson and other named defendants (Richard Call, Robert Church, and Clyde Curry) with unlawful possession of sugar "on divers dates in the months of April, May and June, 1957" (R. 1a, pp. 9–10). The fourth count charged Pearson, Curry, and Mayford Walker with possession of sugar "on or about May 21, 1957" (R. 1a, p. 10). Counts 1 and 2 of the other indictment (case No. 450)—the only two counts of that indictment on which Pearson was convicted—charged unlawful possession of sugar on or about April 1, 1957, and May 13, 1957, respectively (R. 9–10) by Pearson and three persons who were not named in any counts of the first indictment—petitioner Wiles and two other persons named Wiles.

Thus, while the illegal possession charged in the foregoing specific date counts occurred within the period covered by the "divers dates" count, the specific date counts named, as defendants who jointly committed the offenses with Pearson, one or more persons not named as defendants in the "divers dates" count.[7] The statute makes it unlawful "to have or possess any * * * property intended for use in violating the provisions of this chapter * * *" (26 U.S.C. (Supp. V) 5686(b)). Of course, each act of illegal possession is a separate offense. Since the "divers dates" count and the specific date counts involved acts of illegal possession by different groups of defendants, and therefore for different illegal uses, they charged separate offenses under the statute.[8] Moreover, execution of Pearson's prison sentences on these counts has been suspended (see *supra*, p. 5).

3. Petitioner Pearson contends (Pet. 15–16) that he was prejudiced by the failure of the "possession" counts

[7] The sixth count of the indictment in case No. 435 charged Pearson, Curry, and Isaac Call with illegal possession "on or about January 17, 1957" (R. 1a, p. 10)—a date prior to the period involved in the "divers dates" count.

[8] This case, therefore, is significantly different from *United States v. Carroll*, 345 U.S. 457, upon which petitioner Pearson relies (Pet. 14, 16–17). There the question was which of two treasury forms was the "return", the failure to file which violates Section 145(a) of the Internal Revenue Code (imposing the duty to file returns). The Court held that the return referred to in Section 145(a) is Treasury Form 1096 (which must be signed and verified) and not Form 1099 (which need not be signed or verified). The Court, accordingly, sustained the dismissal of an indictment charging, in 101 counts, 101 failures to file "returns" on Form 1099. In the instant case, however, there is no question that the offense which the statute condemns is the illegal possession, and that each act of such possession is a separate offense.

of the indictment in case No. 435 to cite the statute alleged to have been violated, as required by Rule 7(c) of the Federal Rules of Criminal Procedure. As petitioner recognizes, however, Rule 7(c) explicitly provides that "Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." Petitioner has not shown that he was prejudiced by the error. As the Court of Appeals pointed out (Pet. 26), Pearson "was represented at the trial by able counsel, whose many objections show complete familiarity with the technical requirements, but he sought no additional information and made no objection, before or during the trial, about the omission of the statutory citation." Furthermore, the court below correctly stated (*ibid.*) that "it is perfectly clear from the content of each count that it charged a violation of Title 28 USCA § 5686"—the statute that was specifically cited in the indictment in case No. 450, which charged the same statutory offense.

4. Petitioners contend (Pet. 18) that there was a failure of proof in case No. 450 that sugar is a necessary ingredient in the manufacture of distilled spirits; and that, consequently, it was not shown in that case that the possession with which they were charged was unlawful. But the applicable statute, 26 U.S.C. (Supp. V) 5686, prohibits the possession of property "*intended* for use in violating the provisions of this chapter" (emphasis added). Thus, it is not required to be shown that sugar is necessary in the manufacture of illicit whiskey, but only that it be possessed

with intent that it should be used for such purpose. As the Court of Appeals stated (Pet. 29):

> there was abundant proof that the sugar was sold by Pearson and purchased by Wiles for the purpose of making illicit whiskey. Whether Wiles might have made the whiskey without the sugar is quite irrelevant when it clearly appears that he acquired the sugar for the purpose of the whiskey distillation.

5. Petitioner Pearson urges (Pet. 3, 16) that the substantive offense described in the conspiracy count (count 2 in case No. 435) is a misdemeanor only, and that consequently the punishment for the conspiracy could not, under 18 U.S.C. 371, exceed the maximum punishment imposable for the substantive offense.[9] This contention, not raised in the court below, is untenable. The indictment charged that one object of the conspiracy was to file false returns with the Internal Revenue Service. The filing of such returns falls squarely within 18 U.S.C. 1001, which makes it a felony to make any false or fraudulent statement in any matter within the jurisdiction of any department or agency of the United States. That the filing of such false returns may also have been punishable as a misdemeanor under 26 U.S.C. (Supp. V) 5213 and 5609, is immaterial. Cf. *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Gilliland*, 312 U.S. 86.[10]

[9] Pearson's sentence on the conspiracy count—a fine of $7,000 and imprisonment for 18 months (*supra*, p. 5)—exceeded the maximum permissible sentence if the substantive offense was only a misdemeanor.

[10] Pearson also contends (Pet. 17–18), without explanation, that the decision below is in conflict with *United States* v. *Fal-*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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cone, 109 F. 2d 579 (C.A. 2), affirmed, 311 U.S. 205. There is no conflict. *Falcone* held that the seller of goods to one whom he knows intends to use the goods in an illicit manner (as in the production of illicit distilled spirits), but not knowing of a conspiracy to commit the crime, is not chargeable as a co-conspirator. Here, however, the conspiracy charged and proved was not to distill illicit spirits, but to file false reports with the Internal Revenue Service.

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